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WINNIPEG BOARD OF TRADE

THE TORRENS SYSTEM

Address delivered before the Board

by

J. B. COYNE

BARRISTER

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English real property law had its origin in the feudal system. The conservatism of the law is no where better exhibited than in the history of the branch which deals with real estate. Although feudalism disappeared in other respects some centuries ago, the law relating to land has not yet completely shaken off the trammels of its origin and early history. They have formed a serious obstacle to reform.

Under the feudal system, land tenure depended upon homage and military service. A change of ownership was accompanied by public ceremony and consequent notoriety. When land became transferable, the parties repaired to the property and in the presence of witnesses the vendor handed a sod to the purchaser in token of the land. The heir or the purchaser paid public homage to the feudal superior. There was general knowledge of these acts. Evidence of ownership was easily obtainable and the facts upon which title depended could be readily proved.

With advancing civilization, and a more complex social organization, the early duties and the primitive symbolical ceremonies disappeared.

Documents, signed and sealed, generally evidenced the acts of the parties. The publicity of earlier days passed away. But title still depended upon events and acts of the successive owners. To ascertain in whom the title was, all the events and all the acts affecting it had to be known and their effect determined. The production of deeds, mortgages, wills and other documents showing a title descending to the last apparent grantee did not necessarily mean that he was the owner. For someone in the chain of title might have executed a conveyance prior to the one produced and have thereby transferred the title to some entirely different chain of owners. Even if the chain was apparently complete and there was no clandestine conveyance, some document might be defective, and the title, therefore, might not pass.

One requisite in determining ownership was to know that there were no other documents diverting the title. To meet this requirement the first step in registration was made and public offices were established where title deeds

might be deposited, and deeds so deposited became effective as against unregistered or subsequently registered deeds, if there was any conflict. This is the most elementary form of registration system. So far as concerned acts evidenced in writing, public knowledge again prevailed as in the old ceremonial days. Secret transactions could hardly avail to affect title.

Under this system, however, the validity of deeds deposited had still to be passed upon. A registered link might still be defective. The next development therefore was a system of registration vouching the title to those dealing with land, a system of registration of titles in contradistinction to a system of registration of assurances or documents of title.

The Torrens System is a system of registration of title. It is also a system of modernized conveyancing with short concise documents instead of the lengthy and complicated documents which preceded. It is the last word in simplifying title to land and its transfer. Just what it is and how beneficial its introduction has been, may be best appreciated by looking at conditions before its advent, or where it does not apply.

Where the Torrens or some other system of registration of titles is lacking, the title to land, as previously pointed out, depends upon the acts of the successive owners of the property, mostly evidenced by deeds, but sometimes dependent also upon events. It is necessary to investigate the title from the time of issue of the Patent from the Crown, or for a period of sixty years, and the regularity of all acts and the bearing of relevant events during that period have to be ascertained before a good title is educed. It is not sufficient that a purchaser has paid for his land, received a deed and obtained possession of the property. No purchaser can be satisfied with his title unless he can show that his deed is the last link in an unbroken chain of properly drawn, duly executed and otherwise valid conveyances and other documents; that all necessary events have happened and all necessary acts have been properly performed; and that all are satisfactorily evidenced for the whole of the time from the issue of the Crown Patent or for sixty years; and in addition he must be satisfied that there are no other deeds, acts or events which cut his chain of title at any point.

In 1704 a system of registration of deeds was provided by an Act of the English Parliament for the East Riding of the County of York, and a few years later for the County of Middlesex and the rest of Yorkshire. This system was also early adopted in the United States, and is still in force throughout the Union. It was also adopted

and is still in force in many of the British Dominions, including the Maritime Provinces. Under it all instruments in each municipality or other territorial division, are registered in their order, but no index is kept of the particular lot, block or parcel of land affected. The chain of title is traced by means of an alphabetical index of the names of the grantors.

In Ontario this primitive registration system was improved by keeping what was called an Abstract Index, by which a separate account is kept of each specific division of land and in each of these accounts is entered a list of all documents mentioning that particular piece of land. Instruments, such as wills, powers of attorney and general assignments or conveyances, which do not mention any specific land are entered in what is called the General Register. In case a registered document mentioning specific land did not appear upon the abstract provision was made for pecuniary compensation to any person injured thereby.

The Ontario system was introduced into this Province shortly after this country became part of the Dominion. It is what is now known here as the "old system."

These systems of registration give priority to recorded documents over conflicting unregistered documents: and among recorded documents according to the time of filing. They remove the danger of unknown documents affecting the title: but do not otherwise affect title to land or the evidence of title.

They do not obviate the necessity of a close scrutiny of all transactions relating to the land to ascertain the title. For no means is provided for authoritatively determining the legal effect of documents recorded, nor for excluding from the abstract of any parcel instruments which do not affect that parcel. Even where there is an "Abstract Index" to set forth a list of all registered instruments mentioning the particular piece of land, and even though it may appear from the abstract that there is a perfect chain of title, it is not safe to rely on this index alone. Every one dealing with the land must examine each instrument appearing on the list and every document referred to in any of them and must search the General Register under the name of each successive owner. He must determine for himself the legal effect of each instrument. If he, or his legal adviser, makes a mistake, he may lose the land. To effectually satisfy himself, a solicitor may have to critically examine hundreds of documents, as is the case with some properties in this city under the old system, many of which he will find do not affect the property in question, and a great many of which consist of incumbrances long since paid

off, notices of suits, annuities and life interests long since determined, discharges of mortgages and certificates of dismissal of suits. And after all this labor he may be unable to determine with certainty whether his client has a good title or not. A link may be missing in the written evidence owing to the title having been acquired by possession or heirship or owing to the loss or non-registration of some document. In such cases the record must be supplemented by outside evidence, which with the passing of time may be difficult and sometimes impossible to obtain.

Whether it is complete on the register or not, the chain of title must be examined from the beginning to see that the deeds, wills and other documents through which title is traced are proper documents; that none have been forged or altered; that all have been properly drawn, and duly executed by the proper parties; that they had the requisite capacity and that all requirements of the statutes have been observed: that every testator possessed the proper mental capacity at the time of signing his will; that it was read over by or to him; that he signed in the presence of the witnesses and that the witnesses signed in the presence of each other; that each document refers to the particular property in question; that other documents recorded on the same abstract and mixed up with them do not; that the taxes are paid and, in some jurisdictions, that no tax sale has occurred; that each grantor was of age; if an owner died before disposing of the land, whether he died intestate; or whether he left a will; in the latter case, whether he was married or unmarried; if married, whether the will was made after his marriage; and many other questions. And after exercising all the care, skill and caution possible, some unexpected flaw may be discovered. This may be illustrated by two reported cases.

In an action to enforce a contract for the sale of land, it appeared from the register that the Vendor had a good title. No defect was apparent. The Vendor claimed as devisee under a will. He had several transactions in connection with the property. He had secured loans and given security on the property, including one or two mortgages to loan companies. The will upon which his title hinged was in due form, properly executed, duly registered. Yet it had no legal effect whatever. For after the testator had made his will, he had married and his will was thereby revoked by virtue of the statute relating to wills and became absolutely null and void. The Vendor had no title to the property and yet several solicitors who examined the record passed his title as valid, and several persons advanced money upon its supposed validity.

another case a testator who died in 1854 devised his farm to his widow for life, and after her death to his son. The will was duly registered. The son shortly afterwards purchased his mother's life interest, and then, thinking himself absolute owner of the land, sold it to another, who in turn sold it to the Defendant. He bought in the belief that his Vendor had a good title. The Defendant moved onto the land and lived there and worked and improved it for many years, and no doubt depended on it to provide for his family on his death. In 1874, however, the widow of the testator died, and within the period of ten years fixed by the Statute of Limitations, the heirs at law commenced action against the Defendant and recovered the land from him because the devise to the son was void, as he had been a witness to the will. All that the Defendant obtained was a lien upon the land for the value of the permanent improvements he had made, less the rental value of the premises from the widow's death. He had nothing for the purchase money he paid and practically nothing to represent the property which for almost thirty years he had considered his own.

Prior to the introduction of the Torrens System, title to land could nowhere be found authoritatively determined so that a purchaser could entirely rely upon it. It depended upon a series of documents and events. The best one could get was an authoritative list of documents, in that no unregistered document could claim priority. With the multiplication of entries, testacy and intestacy of owners, incompetent conveyancing, and other causes, the number of defects likely to be found in a title grows as the years go on with the result that the investigation of title increasingly involves more time and expense, more delay, uncertainty and insecurity. I remember serving 87 requisitions in respect of one Toronto property. This process of investigation moreover has to be repeated with every sale, mortgage or other dealing with the land.

In the United States the system of registering documents authorized by statute does not include our device of an abstract index. The difficulty of obtaining legislative remedy for the conditions in which purchasers of land found themselves, left it open to private enterprise to grapple with the problem which public action failed to solve. The high value of properties, the large number of transactions, and the great evils and defects in the operation of the public system, offered considerable pecuniary reward for certainty of title and land title guarantee companies were devised which make up unofficial abstract indexes of their own and for a percentage on the value, indemnify purchasers and mortgagees against loss by defective title. The vested interest

of these companies has since stood in the way of improvement of the public system. Before the Torrens System was introduced it was even in contemplation to form such a company in Toronto.

The defects of the old systems of showing title were appreciated in England long ago. A movement for improvement led to the appointment of a Royal Commission in England in 1830, followed by several others. But practical results were slow in coming.

It fell, therefore, to the genius of an Australian, Sir Robert Torrens, (1814-1884) to discover the remedy for the unsatisfactory conditions prevailing and to first apply registration of title to English real estate law. He had been a Collector of Customs in Adelaide, South Australia, and as such conducted the registry of shipping at that port. He was familiar with the transfer and mortgaging of ships. He proposed that the principles serving in the case of title to ships, to joint stock company shares, to funded stock and to registered stock and debentures, should be applied to transactions in real estate: that the documents used should be simplified; that the ownership of an absolute and indefeasible title should be established and certified under governmental authority; that a new certificate should issue to the grantee whenever an owner divested himself of his ownership, with an endorsement on the certificate of all other transactions, so that the certificate should always be an authoritative and summary statement of the exact state of the title: that an assurance fund should be created to meet any damage suffered by individuals whose rights might be taken away by reason of the operation of the Act. His object was to combine security of title with facility in its transfer. His statute was devised and made public in 1856. It was extensively discussed. In fact Sir Robert Torrens and a small group with him ran for the legislature in 1857 on a platform of land law reform. The statute was introduced in the South Australian Legislature in 1857, and passed January, 1858.

The outstanding characteristic is that it is a system of registration of title. In contradistinction to the old system the Torrens System does not purpose merely to record the fact that certain documents have been made: it does not permit instruments to be recorded as affecting the title of any property which are of no legal effect. Its purpose and its actual operation is to record the title, *i.e.*, to set forth the legal result and effect of all operative instruments affecting the land.

The title of any person claiming to be registered as owner must be investigated by a public officer. When proved to his satisfaction, the title is then registered—not the num-

erous deeds constituting the written evidence of his title, but the fact that the person who has thus established his title is the owner of the property, or of some interest, is certified in the register; and if his title is subject to any qualifications, mortgages or otherwise, these are also specially stated in the register.

The Torrens System is by no means the only system of registration of title in operation. Several of the countries of Continental Europe have systems of registration of title in force—in some places for several centuries. But the distinction of Sir Robert Torrens lies in the fact that he evolved a system which could be applied to so intractable a subject as English real property law; and this he probably did without assistance from the other systems. His success is attested by the fact that it was almost immediately adopted by all Australian States and has subsequently spread to all British Dominions and the United States; and the more closely his scheme has been adhered to, the more successful has been the operation of the system.

The essential features of the system are:

1. A warranty by the State of an indefeasible title in favor of a person registered as owner of an interest in land.

2. The creation of an assurance fund, from contributions by registered proprietors of a small percentage of the value of their lands, to answer any loss occasioned by registration of a proprietor, to persons who have thereby been deprived of any rights.

3. The transfer of the registered estate only upon entry upon the register, in lieu of transfer upon execution of a document: and the substitution of one estate only, namely, the registered estate, in place of two estates, one legal and the other equitable.

4. The issue of a duplicate of the register with all entries thereon so that the proprietor holds a document, which is an exact copy at the time of its issue, of the entries in the register.

5. The non-registration of trusts, except in case of an executor or administrator.

6. The conclusiveness of the register in favor of persons purchasing interests in land in good faith for value and relying upon the state of the title shown on the register.

7. The necessity of entry on the register to preserve rights to the land.

8. The protection of rights derived from registered proprietors or existing in respect of registered estates by a system of caveats.

9. The employment of official maps as part of the machinery of the system, in aid of the register and the documents filed.

10. The creation of mortgages by means of a charge on land in lieu of a transfer of the proprietor's estate.

11. The authorization of simple statutory forms of instruments for use in dealings with registered lands, with rights and liabilities implied instead of these being required to be set out in full in the instruments.

The Manitoba statute is called the Real Property Act. The Ontario, Alberta, Saskatchewan and Dominion statutes are in each case called the Land Titles Act. While in principle the same, the various statutes differ in numerous provisions, sometimes apparently enacted only from a pharasaical desire to have a statute not like other Acts.

Bringing Land Under the System

All the Acts provide that the owner of any interest in land whether legal or equitable may apply for registration of his interest.

In this Province the Registrar may in his discretion refuse to entertain an application unless all persons other than the applicant who are interested in the land consent to the application.

In practice the interest brought under the Act is almost invariably the fee simple. An application will not be entertained to bring an undivided interest such as a half share or interest nor that of a mortgagee, under the Act. Leasehold interests, however, for long terms of years have been brought under the operation of Torrens statutes and such an application would no doubt be entertained here.

What is required in order to bring the land under the statute is not an absolutely good title but a substantially good title regardless of technicalities. With the Assurance Fund at his back the Registrar can afford to disregard technicalities, but, in view of his duty to the Assurance Fund he has to be careful not to accept titles with any serious defect.

When application is made to bring land under the Act, opportunity is given to persons who appear to have an interest whether from the records of the old system or in any other way which brings them to the Registrar's attention, to have their rights adjudicated upon before the Certificate of Title issues.

A title acquired by length of possession under the Statute of Limitations may be brought under the Act, but, so far as the Province of Manitoba is concerned, this must first be established by a suit in the Court of King's Bench. In Saskatchewan and Alberta the jurisdiction to deal with such an application, rests not in the Land Titles officials, but in a Judge of the Supreme Court and the Master of Titles respectively.

In Manitoba the applicant to bring land under the Act may direct the title to issue in the name of some other person. It is doubtful whether this is authorized to be done in the other jurisdictions.

The Certificate of Title

The body of the Certificate of Title is brief and clear. The usual certificate of title sets out that a named person of named residence and occupation "is now seized of an estate in fee simple in possession, subject to such mortgages, liens and incumbrances as are notified by memorandum in writing or endorsed hereon, in that piece or parcel of land known and described as follows."

The conception of the lay mind is an absolute ownership by such person subject only to mortgages or other registered documents: although the Manitoba certificate plainly sets out on its face numerous other rights or obligations to which the certificate is subject. But many such rights and obligations affect the land without any memorandum of them appearing on the Certificate of Title.

To many of these rights and obligations, certificates in all the Prairie Provinces are subject.

They are all subject to any subsisting reservations (or exceptions) contained in the original grant from the Crown. This is always on file in the Land Titles Office and open to inspection.

Rights of navigation, rights of navigators to land on shores of navigable waters and rights of way are reserved in many Dominion Grants. There is often a reservation of mines and minerals which includes the precious metals, coal and oil. The expression "mineral" is a very wide one and may include a great many substances not popularly considered to come within this term. Any person

intending to deal in any substance obtained from beneath the surface, should very carefully inspect the Crown Grant and consider the effect of any reservation or exception.

2. The Certificate of Title is subject to all unpaid taxes. These can always be ascertained by enquiry of the proper municipal officer.

3. It is subject to unregistered subsisting leases or agreements for leases for a period not exceeding three years where there is actual occupation of the land under the same. It is, therefore, important for this reason and others mentioned later that land should be inspected prior to purchase or mortgage as the right to possession may not be in the registered owner and he may not be able to give possession to the purchaser. It is necessary to ascertain definitely what claim there may be on the part of any person in possession of the property.

4. Any public highway.

5. Any judgment, decree or order of the Court against the registered owner of the land registered since the date of the certificate of title and which has been maintained in force. A search in what is known as the General Register will disclose whether there are any such.

Under the Saskatchewan, Alberta and Dominion Act the land is made subject to executions and the registrar is directed to enter these up on the certificate of title. It is quite possible, however, that executions are binding upon land even though they are not entered up. The purchaser is always wise to get a General Register Certificate, even under these statutes, in the name of the registered owner, to make sure that there are no judgments which may attach upon the lands.

6. Any right of expropriation by statute. This right is usually exercised only by railways, municipalities, or the government. Whether such a right has been exercised in reference to any particular property can usually be ascertained in the Land Titles Office. It often appears on the certificate but frequently does not.

7. Under the Alberta, Saskatchewan and Dominion Acts, the Certificate of Title is subject to any public right of way or other public easement. An easement created in favor of private individuals is not protected unless notified by caveat.

In Manitoba, however, no such notification is necessary to maintain either public or private easements. The Cer-

tificate of Title is subject to any unregistered subsisting right of way or other easement howsoever created upon, over or in respect of the land. There may be easements, for instance, in respect of light or drainage; or in respect of telegraph or telephone wires crossing in the air, in respect of drains or water pipes crossing underground and in respect of a foundation to support a wall. Some of these would be apparent upon inspection. In some of these cases, whether such an easement existed or not could not very well be positively ascertained by a purchaser at all.

8. In Manitoba the Certificate of Title is also subject to Mechanics' Liens affecting the land, whether registered or not. Such liens affect the property as soon as any work is done or materials furnished and may be registered before or during the performance of the contract or services or the furnishing of materials. They must be filed within thirty days after completion of the contract or services or the furnishing of the last material. In the Provinces other than Manitoba unregistered Mechanics' Liens are in just the same position as any other unregistered interests and in the absence of notice would be cut out by subsequent registration.

9. In Manitoba and Saskatchewan the certificate is also subject to the title of any person adversely in actual possession of and rightly entitled to the land at the time the land is brought under the new system and who continues in actual occupation. That is if a person has acquired title by length of possession before the land is brought under the Act, he is not deprived of his ownership so long as he remains in possession even though a Certificate of Title is issued to another. Again the necessity for inspection of property is shown.

10. In Saskatchewan it is also subject to any right of way or easement granted or acquired under the provisions of the Irrigation Act, and in Alberta, under the provisions of any Act or law in force in the Province.

There is no good reason why the reservations or exceptions in the original grant from the Crown should not be set out in the Certificate of Title. Public highways, rights of expropriation, rights of way and easements, mechanics' liens and rights under 10 above cannot be readily ascertained and should not be allowed to affect persons dealing bona fide with the lands, without knowledge of their existence. The law should be changed so as to compel registration of some document showing their existence or in the case of a public highway it should be in use, if a purchaser

or mortgagee is to be affected by them. The other exceptions can be readily enquired into and determined; and objection to them can not reasonably be taken.

The duplicate Certificate of Title must be delivered up at the Land Titles Office whenever any transfer, mortgage or incumbrance is registered and is then made to correspond with the copy in the register, but at any subsequent time it may differ from the certificate in the register.

1. By reason of registrations made by some person other than the one registered as owner or having a registered interest, such as caveats, mechanics' liens, orders of the court and lis pendens.

2. By cancellation of the certificate of title corresponding to the duplicate by reason of some dealing with the land other than by the owner as, for example, transfer of land after a sale for taxes, or by the Court, vesting order of the Court, transfer, or foreclosure under mortgage, or in Saskatchewan and Alberta, transfer on sheriff's sale.

3. Issue of a new certificate of title on proof of either fraudulent or erroneous loss of the old certificate, in which case the owner may register dealings requiring the production of the duplicate by producing the new certificate so issued.

Application of General Law

Subject to the essential principles of the system and to any express negativing provisions of the statute, the general law applies to land under the System. The law governing the holding of land by corporations, aliens, lunatics, married women, churches, its acquisition and alienation, assignments for the benefit of creditors, fraudulent conveyances, mechanics' liens, judgments, forfeiture, expropriation, attachment, joint tenancy, tenancy in common, partition, change of trustees and devolution of estates, among other subjects, is equally applicable whether the land is under the old or the new system. The outstanding change is the indefeasibility conferred upon the certificate of title in the hands of a bona fide purchaser for value. In regard to the Statutes of Limitations there has been some question but it has been held that they are not inconsistent with the Torrens System and apply so far as they are not expressly excluded.

In a number of the jurisdictions it has been held that the Statute of Limitations apply to the Torrens System.

In Alberta there are no statutory provisions restricting the application of the Statute of Limitations and it has been held that the Statute applies generally to land under the System.

In Saskatchewan there is now a provision that title by possession can not be acquired against the registered owner by length of possession merely. With this exception the Limitation Acts are still in force; and limit the time for recovering lands, arrears of rent, arrears of interest, the recovery of principal money secured by mortgages or charges on land and fix the time for the creation of easements by user, etc.

The Saskatchewan provision above referred to is also in force in Manitoba. But in Manitoba there is a further provision whereby the Limitation Acts, so far as they apply to mortgages, are excluded from operation, except in reference to the liability under covenants to pay money; so that there is no time limited within which redemption may be had by a mortgagor, but suits to recover monies must be brought within the periods named in the Real Property Limitation Act.

In Manitoba and Saskatchewan under the first noted provision it may eventually be held that it is only a bare trespasser who can not acquire title by possession but that persons who go into possession of land with the permission and with the knowledge of the registered owner and more especially if the entry is under a contract to purchase, may by possession for ten or twelve years respectively acquire title as against the registered owner.

I do not see any reason to doubt that easements such as a right of way for instance may be acquired by user for the necessary length of time even as against the registered title in either Manitoba or Saskatchewan.

The Position of the Registered Owner

The Certificate of Title is by the statute conclusive except in the case of fraud wherein the registered owner, mortgagee or incumbrancee has participated or colluded. But it is not conclusive where the certificate or entry is obtained by a forged document even though the grantee is innocent and bona fide. The duty rests on any one dealing with the lands to see that he is dealing with the real owner and has a genuine document. But even though a certificate is obtained by a forged document, and is liable to be set aside, any bona fide purchaser from such holder gets a perfectly good title.

Of course, its conclusiveness does not apply as against equitable rights existing between the registered owner and

any other person. If a transfer is made by way of security, for instance, the registered owner cannot claim the absolute ownership as against the debtor or transferor.

The old system gives priority to registered instruments over unregistered or subsequently registered conflicting instruments in the absence of notice, but the purchaser must investigate and determine with the assistance of the register what title his vendor has. Under the new system a bona fide purchaser for value may rely upon the title of the vendor as set out in the Certificate of Title and he is absolved from the duty of inquiring as to its antecedents.

It has authoritatively been said, "The main object of the Act and the legislative scheme for the attainment of that object appear to their Lordships to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of their vendor's title and to satisfy themselves as to its validity. The end is accomplished by providing that any one who purchases bona fide and for value from a registered proprietor and enters his transfer or mortgage in the register shall thereby acquire an indefeasible right, notwithstanding the infirmity of his grantor's title."

Registration

Registration and its effect are outstanding features of all Torrens Systems. Until the proper entry appears upon the register no instrument affecting land under this System is effectual to pass any interest or estate in the land except as against the person making the same and it does not affect any bona fide transferee.

Although the Registrar passes upon the sufficiency and fitness of instruments for registration he does not assume to deal otherwise with the validity of a mortgage or transfer, nor the propriety of a caveat, lis pendens, mechanics' lien or other instrument registered. On registration a memorandum of the instrument merely is endorsed on the Certificate of Title but all instruments registered are deemed to be part of the register just as if they were fully set out therein. A new certificate of title can be obtained at any time and with a general register certificate as to the registered owner those instruments only which are still in force and affect the property, are shown. Instruments in the chain of title to the registered owner and entries of instruments which have been discharged are eliminated.

The simplifying process of the system is shown in the documents used. Transfers, leases, mortgages and incumbrances are created and transferred by documents

simple in form. The statute attaches to these documents certain provisions which are not set out in them. Transfers, where land is mortgaged, have implied in them a covenant by the transferee to indemnify the transferor against the mortgage. In Alberta there is implied also a covenant with the mortgagee to pay the mortgage: in Saskatchewan a covenant with the mortgagee to pay so long as the transferee remains registered owner.

In the case of leases, there is implied a covenant to pay rent and to repair, and power to the lessor to enter and view state of repair, to require the tenant to make good any defects, and to take possession for breach of covenants.

In the case of mortgages, there is implied power to sue for the money, and to enter and distrain for rent; to enter into possession after notice and to sell and obtain foreclosure, and to take all the proceedings necessary therefor.

But these beneficial provisions do not prevent the parties from agreeing upon almost any kind of terms and incorporating them in the transfer, lease, mortgage or other document by express and appropriate language. For it is provided in each of the Torrens Statutes that every covenant and power declared to be implied in any instrument by virtue of the Act may be negatived or modified by express declaration in the instrument. For instance, while it has been declared that in the absence of any such negation of implied powers and covenants, the provisions of the Act relating to sale and foreclosure constitute a complete code and all proceedings must be taken in accordance with the Act, nevertheless the mortgagor and the mortgagee may expressly provide for sale otherwise than through the Land Titles Office. The mortgagor may empower the mortgagee to sell with or without notice, under any conditions which they may see fit to agree upon and without proceedings in the Land Titles Office or in Court, and in such case may authorize the mortgagee as his attorney to execute a transfer of the property to the purchaser.

Caveats:

A Caveat is a notice which is authorized to be registered by any one asserting a claim in respect of any estate or interest in land so as to preserve the same to the claimant if valid. In the absence of a caveat, a transfer might be made to a bona fide purchaser so as to cut out whatever right the claimant had. Even though no caveat has been registered, if the purchaser has knowledge of the claim it may well affect the title that he acquires. It is very unwise, however, for any claimant to take the chance of not

registering a caveat, for the statute says that aside from notification on the register, no person shall be affected by notice direct, implied or constructive of any trust or unregistered interest and knowledge of any trust or unregistered instrument shall not be imputed as fraud. In order to succeed in respect of such an unregistered claim against a prior owner it would be necessary to show knowledge of the claim and some belief on the part of the purchaser that the unregistered claim was a valid one, and a deliberate intention to deprive the claimant of his interest or some right in respect of the land.

There is some diversity in the different jurisdictions as to what is necessary in order to entitle a claimant to file a caveat.

In Manitoba and Alberta any person claiming an estate or interest in land, mortgage or incumbrance may file a caveat.

In Saskatchewan an instrument in writing is necessary as a basis for a caveat and it has been held that this right does not apply in regard to instruments which can be registered. A mortgage, for instance, is a registerable instrument. It has been held that a caveat cannot be registered in respect of a mortgage, but the mortgage must be registered. It has been further held that a mortgage which does not specify the consideration is not registerable in Saskatchewan, and caveats in respect of such mortgages have been rejected although a recently noted decision of the Master of Titles indicates a reversal of that policy; nor is the right to file a *lis pendens* now admitted by the land titles officials. A mortgage for an indebtedness without specifying the amount has been in a perilous position in Saskatchewan. Again a caveat upon a mortgage by deposit of the Certificate of Title unless there is an agreement in writing is also rejected.

While these rulings are followed at the present time it may well be argued that they are incorrect and that the Saskatchewan, like the Manitoba and Alberta Statutes, contemplates registration in respect of any interest.

The Assurance Fund

The Assurance Fund is the special fund created under the Torrens System for the compensation of persons sustaining losses by the operation of the system. If the person rightfully entitled to any interest in land has lost it owing to another person having obtained a registered interest which is indefeasible as against the right-

ful owner, provision is made for pecuniary compensation in certain cases to the person so deprived of his property.

This scheme of indemnity must be carefully distinguished from the system of guaranteed titles which has grown up in the United States. Speaking generally under the Torrens System the title of a purchaser who becomes the holder of the certificate is indefeasible, and pecuniary compensation is given to the person whose rights are cut out by the operation of the Statute. The purchaser retains the land. Under the American system the conditions are reversed. It is the purchaser whose title is guaranteed, and if any other person successfully asserts a claim, the purchaser gets pecuniary compensation from the guarantee company and the other person gets the land.

In regard to the Assurance Fund a distinction must be drawn between the Manitoba Statute on the one hand and the Saskatchewan, Alberta and Dominion Acts on the other. In Manitoba the right of recovery is wider, and the procedure simpler.

While in general the ultimate result is much the same, an action may be brought directly against the Assurance Fund in Manitoba in all cases, whereas under the other Acts under many circumstances an action must first be brought against the person who is responsible for the loss or damage, and only in the event of not succeeding in realizing from him, can the Assurance Fund be made liable.

Broadly speaking, such cases are where there has been some mistake of the land titles officials, or some fraud enabling registration to be made, or misdescription of property. If the land mortgage or interest can be recovered, no claim lies against the fund. The action must be brought within the time stipulated by the statute which generally speaking is ten years in Manitoba and six years in the other jurisdictions.

In Saskatchewan the statute provides that the Assurance Fund shall not be liable for compensation by reason of the improper use of the seal of any corporation, and where what is done is *ultra vires* of a Company, the transferee or mortgagee acquires no rights.

It is necessary to be sure that the company has power to execute and that the execution is not contrary to the company's memorandum of association and regulations, which are filed with the Registrar of Joint Stock Companies. Where loss is due to failure to determine the above questions the fund is not liable.

The fund is not liable where the loss has been caused or contributed to by the owner's negligence.

It is necessary that the person dealing with land should ascertain the identity of the transferor, mortgagor or other person purporting to deal with the land, with the person who holds the certificate of title, and also perhaps to ascertain that the transferor, mortgagor or encumbrancer is not an infant or a lunatic. Nor can rights be acquired from a fictitious holder. Nor by a forged document, nor by one executed under a power of attorney, unless the attorney has the necessary power.

Damages are not recoverable against the Assurance Fund where no actual damage of a money value has been suffered.

Where the Plaintiff's mortgage was registered to secure a past indebtedness, and by an oversight of the land titles officials the abstract omitted to show a large prior mortgage, the Plaintiff failed to obtain judgment against the Assurance Fund because the evidence did not show that the mortgagor had any other property upon which the plaintiff could have obtained security if the abstract had been complete or could have realized had he taken proceedings to collect. The plaintiff therefore failed to show that he had sustained any pecuniary loss by reason of the failure of the Registrar to show the prior mortgage on the abstract.

No damages against the Assurance Fund can be recovered by reason of the breach by the owner of any trust whether express, implied or constructive. This, of course, does not in any way infringe upon the right of the beneficiary to enforce upon his trustee observance of the trust, or for damages in case of breach thereof, which rights still exist under the general law. The beneficiary can always protect himself by filing a caveat. In such case if loss is caused by disregard of the caveat, the beneficiary can recover.

Damages can, however, be recovered against the Fund where the Registrar acts against the express order of the Court, for instance,

Chief Justice Harvey of Alberta recently held that only a person to whom a Certificate of Title had been issued, could recover from the Assurance Fund, and that as a mortgagee is not deprived of an interest for which a Certificate of Title has been or could be granted, he was not entitled to compensation.

Fortunately on appeal the full Court disag eed with the opinion expressed by the Chief Justice.

This case, however, is instructive as to the difficulty of recovering in the Western Provinces from the Assurance

Fund. It was held that although the plaintiff had sued on the mortgage covenant and recovered judgment which could not be realized, he was not legally entitled to recover from the Assurance Fund, because he had not sued the mortgagor for damages as required by the statute; and that before claiming on the fund he would have to institute such an action for damages; and after showing that such a judgment was not collectible, he could then claim on the fund. This circuity of procedure is obviated by the Manitoba provision. One action would be sufficient joining both the district Registrar and the person guilty of the fraud or wrongful act.

In regard to implied covenants in transfers; in regard to the right to protect by caveat interests in lands, mortgages, incumbrances; in regard to exceptions from the indefeasibility of the Certificate of Title; in regard to the effect of the Statute of Limitations; in regard to the right to claim against the Assurance Fund, there are serious differences between the Acts of the Provinces, which might with advantage be eliminated. Improvements in all these respects can be made without impairing or affecting the principles of the system. There is no reason either why uniformity should not prevail in the Torrens Systems in Manitoba, Saskatchewan and Alberta. I hope that the efforts of the Canadian Bar Association, the Credit Men's Association, Boards of Trade and other bodies in this direction may be crowned with success. It will bring benefit to everyone and injury to none.